

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT PONTE,

Plaintiff-Counter-Defendant-
Appellant,

v

SANDRA HAZLETT, d/b/a HAZLETT &
ASSOCIATES, P.C.,

Defendant-Counter-Plaintiff-
Appellee.

UNPUBLISHED

April 24, 2012

Nos. 298193; 298194
Washtenaw Circuit Court
LC No. 08-001017-NM

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

These consolidated appeals involve plaintiff's action for legal malpractice in connection with defendant's representation of plaintiff in an underlying divorce action, and defendant's counter-complaint for breach of contract to recover attorney fees incurred in the representation of plaintiff in the divorce action. In Docket No. 298193, plaintiff appeals as of right the trial court's judgment granting summary disposition in favor of defendant in regard to plaintiff's claim for legal malpractice. Plaintiff also appeals the trial court's judgment, following a jury trial, awarding defendant \$26,231.29 on her counterclaim for breach of contract. In Docket No. 298194, plaintiff appeals as of right the trial court's separate judgment awarding defendant case evaluation sanctions of \$15,500. We affirm in part, reverse in part, and remand for recalculation of case evaluation sanctions.

This case originates from a divorce trial involving plaintiff and his then-wife, now-deceased Pamela Ponte. Following the divorce case, on September 10, 2008, plaintiff sued defendant alleging legal malpractice. Specifically, plaintiff alleged that defendant breached a duty to properly plead and prove his claims and defenses by failing to move for reconsideration of the trial court's September 5, 2006 ruling that plaintiff did not present evidence that he wanted Pamela to pay a share of the marital debt. Plaintiff also alleged that defendant failed to show that Pamela's failure to qualify for social security disability benefits rendered the invasion of his separate premarital estate inequitable. Lastly, plaintiff alleged that defendant breached a duty to accurately state and timely deliver his settlement offer to Pamela, and to argue his position to the trial court at hearings. Plaintiff alleged that as a direct and proximate result of defendant's breaches of duty, the divorce parties were prevented from settling their underlying divorce

lawsuit, and he suffered and would continue to suffer financial hardship, including paying an inequitable share of the marital debt and the invasion of his premarital assets, as well as anxiety and humiliation.

On November 25, 2008, defendant filed a counter-complaint against plaintiff alleging breach of contract based on plaintiff's failure to pay legal fees and related costs incurred during the divorce proceedings. Defendant also alleged that plaintiff failed to pay the balance owing on his account.

On September 9, 2009, defendant moved for summary disposition of plaintiff's legal malpractice claims pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Defendant argued that the attorney-judgment rule precludes liability arising from the reasonable exercise of attorney judgment, and that her tactical decision not to file a motion for reconsideration, her tactical decision regarding how far to pursue the social security issue, and her advice regarding settlement offers were all protected by the attorney-judgment rule. Defendant also argued that plaintiff could not sustain a legal malpractice claim because he could not establish that her alleged acts or omissions proximately caused any injury. After hearing oral arguments from the parties, the trial court granted summary disposition in favor of defendant in regard to plaintiff's legal malpractice claims.

On October 8, 2009, the parties submitted to case evaluation on defendant's counter-complaint. The case evaluators found for defendant and against plaintiff in the amount of \$10,000. Defendant accepted the case evaluation and plaintiff rejected it. Accordingly, defendant's counter-complaint proceeded to trial. Defendant filed an emergency motion in limine to preclude plaintiff from presenting evidence or arguments alleging that she committed legal malpractice. Before the start of trial, the trial court heard oral argument on plaintiff's request to introduce evidence of defendant's malpractice, and ultimately ruled that evidence regarding the alleged malpractice was inadmissible.

Following a two-day jury trial regarding defendant's counter-claims, the jury entered a verdict finding in favor of defendant in the amount of \$36,249.29. Plaintiff moved for a new trial, in part on the basis that there was no evidence to support the jury's award, and that the award was excessive. The trial court denied plaintiff's motion for a new trial, but granted remittitur and entered judgment in favor of defendant in the amount of \$26,231.29.

On April 6, 2010, defendant moved for case evaluation sanctions and taxable costs. Following a hearing on the matter, the trial court awarded case evaluation sanctions in favor of defendant in the amount of \$15,500. Plaintiff now appeals as of right.

I. DOCKET NO. 298193

On appeal, plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition of plaintiff's legal malpractice claims.

We review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although defendant filed her motion for summary disposition under MCR 2.116(C)(8) and (C)(10), the parties submitted evidence beyond the pleadings in

support of and in opposition to the motion, and the trial court considered that evidence in deciding the motion. Therefore, we construe the motion as having been granted under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Maiden*, 461 Mich at 120. “In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Id.* “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Id.*

The elements of a legal malpractice claim are: (1) the existence of an attorney-client relationship (i.e., duty), (2) negligence in the legal representation of the plaintiff (i.e., breach of duty), (3) that the alleged injury was a natural and direct result of the negligence (i.e., proximate causation), and (4) the fact and extent of the injury. *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006). “In order to establish proximate cause, a plaintiff must show that a defendant’s action was a cause in fact of the claimed injury.” *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

The attorney-judgment rule recognizes that “mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence.” *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995). “Where an attorney acts in good faith and in honest belief that his [or her] acts and omissions are well founded in law and are in the best interest of his [or her] client, he [or she] is not answerable for mere errors in judgment.” *Id.* “When an attorney fashions a trial strategy consistent with the governing principles of law and reasonable professional judgment, the attorney’s conduct is legally adequate.” *Id.* at 661.

Here, plaintiff alleged three instances of legal malpractice by defendant: (1) defendant’s failure to move for reconsideration of the trial court’s September 5, 2006 order; (2) defendant’s failure to establish Pamela’s refusal to qualify for social security disability benefits; and (3) defendant’s failure to directly convey plaintiff’s settlement offer to Pamela.

The submitted evidence reveals that defendant’s decision not to seek reconsideration of the trial court’s September 5, 2006 order in the divorce case is protected by the attorney-judgment rule. The trial court’s order, which stated that plaintiff did not request Pamela to pay a share of the parties’ marital debt, is technically correct. Plaintiff did not request that Pamela pay a share of the parties’ debt; rather, he proposed that he be assigned all of the parties’ debt, but also be awarded the entirety of his approximately equal retirement accounts, to use to pay off the debt.

Further, the exchanges and comments by the trial court at the November 17, 2006 hearing immediately before entry of the judgment of divorce demonstrate that a motion for reconsideration of the trial court’s September 5, 2006 order would have been futile. Indeed, defendant’s decision to call plaintiff to testify at that hearing to further advance his proposal, and defendant’s request for “clarification” of the trial court’s order as it related to plaintiff’s proposal, effectively amounted to a verbal plea for reconsideration, which the trial court rejected out of hand. The record supports that defendant exercised reasonable care, skill, and diligence in

attempting to advance plaintiff's position regarding the assignment of debt and award of the retirement accounts, but that the trial court was not willing to change its decision. Although defendant was not successful in persuading the trial court to rule differently, defendant's actions preserved the issue for appeal, and plaintiff ultimately prevailed on the issue on appeal. The trial court in this case properly applied the attorney-judgment rule in determining that no genuine issue of material fact existed concerning whether defendant committed legal malpractice by deciding not to move for reconsideration of the September 5, 2006 order in the divorce case.

The record also reveals that defendant acted in good faith and exercised reasonable care, skill, and diligence on behalf of plaintiff in pursuing the social security disability issue. *Id.* Defendant was "obliged to exert [her] best efforts wholeheartedly to advance [plaintiff's] legitimate interests with fidelity and diligence[.]" *State Bar of Mich v Daggs*, 384 Mich 729, 732; 187 NW2d 227 (1971). Here, defendant pursued this issue at the divorce trial by questioning Pamela concerning whether she attempted to obtain social security disability. Defendant specifically pressed Pamela concerning how many applications she had filed, the requirements that precluded her from qualifying, and measures she could take to qualify. Thus, the record supports that defendant exercised reasonable care, skill, and diligence to advance plaintiff's best interests. *Simko*, 448 Mich at 658. The trial court properly applied the attorney-judgment rule in determining that no genuine issue of material fact existed concerning whether defendant committed legal malpractice in her approach to the social security disability issue.

Next, we conclude that plaintiff failed to establish factual support for his claim that defendant committed legal malpractice by failing to communicate his proposed settlement offer directly to Pamela. A lawyer is prohibited from communicating with a party represented by another attorney about the subject of the representation. MRPC 4.2. Therefore, defendant was specifically prohibited from directly communicating the settlement offer to Pamela. However, the evidence demonstrates that defendant exercised reasonable care to make sure plaintiff's offer was communicated to Pamela indirectly. Defendant presented plaintiff's proposed settlement offer through plaintiff's testimony at trial. The record establishes that Pamela and her attorney were aware of the offer, but did not accept it, thereby necessitating post-trial mediation. Further, at plaintiff's insistence, the mediator reiterated the offer to Pamela's counsel during the post-trial mediation. Plaintiff conceded as much in his letter to defendant following the mediation. Thereafter, the parties were still unable to reach a settlement. The trial court properly applied the attorney-judgment rule in determining that no genuine issue of material fact existed concerning whether defendant committed legal malpractice concerning communication of the settlement offer.

In sum, viewing the evidence submitted by the parties in a light most favorable to plaintiff, we conclude that no genuine issues of material fact existed regarding whether defendant was entitled to the protection of the attorney-judgment rule, and the trial court properly granted summary disposition in defendant's favor on that basis. *Maiden*, 461 Mich at 120. In light of our conclusion that summary disposition was proper pursuant to the attorney-judgment rule, we need not consider plaintiff's alternative claim that there was a genuine issue of material fact in regard to the question of proximate cause.

Plaintiff next argues that the trial court abused its discretion by excluding evidence of defendant's alleged malpractice at the trial on defendant's counter-claim for recovery of attorney

fees. Plaintiff fails to cite any authority in support of his argument, other than an inapplicable footnote in a nonbinding, unpublished opinion. “[A] mere statement without authority is insufficient to bring an issue before this Court.” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). “It is not sufficient for a party ‘simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.’” *Id.*, quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, we need not address this issue and decline to do so.

In his statement of the question involved for this issue, plaintiff also states that the trial court erred in rejecting his proposed jury instructions. However, plaintiff does not further address this issue in the body of his brief, other than noting that the trial court rejected his proposed jury instruction. Accordingly, plaintiff has abandoned any claim of instructional error. *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007).

Further, in the argument section of his brief for this issue, plaintiff also states that the trial court abused its discretion by declining to permit him to introduce evidence that his performance under the attorney fee agreement should be excused because it was impracticable. Because plaintiff did not include this argument in his statement of questions presented on appeal, it is not properly before this Court. *Mich Ed Ass’n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008), *aff’d* 489 Mich 194 (2011); MCR 7.212(C)(5). Further, plaintiff waived this affirmative defense by failing to raise it in his first responsive pleading as required by MCR 2.111(F)(3). See *Unibar Maintenance Svcs, Inc v Saigh*, 283 Mich App 609, 620; 769 NW2d 911 (2009). In any event, plaintiff relied solely on his alleged financial hardship to argue that his payment obligation should be excused. While plaintiff’s circumstances may make his payment obligation more burdensome or difficult, they do not relieve him of a contractual duty to pay. *Chase v Clinton Co*, 241 Mich 478, 484; 217 NW 565 (1928). See also *Rogers Plaza, Inc v SS Kresge Co*, 32 Mich App 724, 743-744; 189 NW2d 346 (1971). For these reasons, we reject this claim of error.

II. DOCKET NO. 298194

Plaintiff argues that the trial court abused its discretion in awarding case evaluation sanctions that were not necessitated by his rejection of the case evaluation award. Specifically, plaintiff challenges (1) fees “for services such as those [incurred] on November 6, 2009 and November 11, 2009,” (2) fees related to defendant’s testimony regarding her “collection costs” on the second day of trial, and (3) fees associated with his first motion for a new trial.

A trial court’s award of attorney fees and costs as case evaluation sanctions is reviewed for an abuse of discretion, which occurs when a trial court’s decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

In determining the appropriate amount of case evaluation sanctions, there must be “a causal nexus between rejection and incurred expenses.” *Haliw v City of Sterling Hgts (On Remand)*, 471 Mich 700, 711 n 8; 691 NW2d 753 (2005). See also MCR 2.403(O)(6), which provides that actual costs are “(a) those costs taxable in any civil action, and (b) a reasonable

attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.”

With respect to fees awarded for November 6, 2009, and November 11, 2009, defendant’s billing record reveals hours billed for (1) preparation of a letter to company and client regarding acceptance of case evaluation, (2) telephone discussion with the court regarding outcome of case evaluation, (3) reviewing a notice from the court regarding an amended order granting defendant’s motion for summary disposition, (4) reviewing a notice from the court regarding an order denying plaintiff’s motion to amend a final order, and (5) reviewing a notice of case evaluation rejection by plaintiff.

Clearly, fees for reviewing the notice of plaintiff’s rejection of the case evaluation were necessitated by plaintiff’s rejection of the case evaluation. However, fees for preparing a letter regarding defendant’s acceptance of the case evaluation were not necessitated by plaintiff’s rejection of the case evaluation because that event preceded the rejection. Fees for a telephone discussion with the court regarding the outcome of the case evaluation also were not necessitated by plaintiff’s rejection of the case evaluation because the discussion would have occurred regardless of whether plaintiff accepted or rejected the case evaluation. Further, fees for reviewing a notice from the trial court regarding the amended order granting defendant’s motion for summary disposition and the order denying plaintiff’s motion to amend the final order were not necessitated by plaintiff’s rejection of the case evaluation because those matters arose and were resolved by the trial court’s order before plaintiff rejected the case evaluation. Accordingly, the trial court abused its discretion in awarding fees for those matters.

With respect to fees awarded for the second day of trial, plaintiff argues that fees related to defendant’s testimony concerning her collection costs were not necessitated by his rejection of the case evaluation. Plaintiff argues that because he successfully argued in his motion for a new trial that defendant should not have been allowed to present such testimony on rebuttal (resulting in remittitur), any fees related to the testimony were not necessitated by his rejection of the case evaluation. However, “[a] causal nexus plainly exists between rejection and trial fees and costs.” *Allard v State Farm Ins Co*, 271 Mich App 394, 402; 722 NW2d 268 (2006), quoting *Haliw*, 471 Mich at 711 n 8. Even though the trial court ultimately ruled that it erroneously permitted evidence concerning the collection costs at trial, it does not change the fact that the trial itself was necessitated by plaintiff’s rejection of the case evaluation. Similarly, with respect to the fees awarded related to plaintiff’s first motion for a new trial, those were incurred following trial, which itself was directly necessitated by plaintiff’s rejection of the case evaluation. Thus, the trial court properly exercised its discretion in awarding fees relating to those issues.

In sum, the trial court abused its discretion in awarding fees related to events that occurred before, and simultaneously with, plaintiff’s rejection of the case evaluation, but properly exercised its discretion in awarding fees related to trial and defending against plaintiff’s motion for a new trial because those fees were necessitated by plaintiff’s rejection of the case evaluation. Accordingly, we affirm in part and reverse in part the trial court’s award of case evaluation sanctions. The case is remanded to the trial court for recalculation of the amount of case evaluation sanctions consistent with this opinion.

Affirmed in part, reversed in part, and remanded for recalculation of the amount of case evaluation sanctions consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

/s/ Henry William Saad